

**Before the
Federal Communications Commission
Washington, D.C. 20554**

| | | |
|----------------------------------------------|---|----------------------|
| In the Matter of |) | |
| |) | |
| Leased Commercial Access |) | MB Docket No. 07-42 |
| |) | |
| Modernization of Media Regulation Initiative |) | MB Docket No. 17-105 |
| |) | |

**FURTHER COMMENTS OF ACA CONNECTS —
AMERICA’S COMMUNICATIONS ASSOCIATION**



ACA Connects — America’s Communications Association (“ACA Connects”) hereby submits these comments in response to the Commission’s Second Further Notice of Proposed Rulemaking regarding leased access.¹ We very much appreciate the efforts the Commission has already made to modernize the leased access rules, including steps to reduce the burdens on cable operators, particularly small cable system operators. The Commission can and should expand upon those efforts here.

¹ *Leased Commercial Access*, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 19-52 (rel. June 7, 2019) (When referring to Parts I-III of the item, we refer to the “*Order*.” When referring to Part IV of the item, we refer to the “*Second FNPRM*”).

The Commission proposed a modification to the formula that would permit cable operators to calculate the “average implicit fee” for leased access based on the tier on which the leased access programming actually will be carried, and seeks comment on whether to make other modifications to the existing rate formula.² We do not object to the Commission’s proposal. Yet we believe that additional steps should be taken to reduce administrative burdens, particularly for smaller entities. The Commission should also set a minimum rate that a cable operator may charge or adjust the formula to avoid requiring the least profitable operators to offer leased access at extremely inexpensive amounts—essentially forcing them to give away capacity that could better be used for broadband.

With respect to administrative burden, the Commission should permit cable operators to use a single set of data in responding to leased access requests over a set period of time rather than having to pull data and recalculate the formula for each request. Under the existing rules, it is burdensome to collect the data needed to calculate the average implicit fee for a particular channel.³ A cable operator may spend

² *Id.* ¶ 41.

³ To determine the maximum rate permitted for leased access based on the Commission’s formula, a cable operator must calculate the “total implicit fee” based on the total subscriber revenue and programming costs per month for the basic tier and all tiers with over 50% penetration. The operator must then multiply the number of subscribers by the number of channels on the basic tier and each tier with over 50% penetration to determine the number of “subscriber-channels” per tier, then divide the number of subscriber-channels per tier by the number of subscriber-channels on basic and all tiers with over 50% penetration to find the “subscriber-percentage.” The subscriber-percentage for a particular tier must then be multiplied by the total implicit fee, which is then divided by the number of channels on that tier to determine the “average implicit fee” for a full-time channel on that particular tier. 47 C.F.R. § 76.970(e).

a thousand dollars or more in man-hours and consulting fees.⁴ This is, of course, burdensome. Worse yet, cable system operators must now compile the data and recalculate the rate *for each leased access request*—meaning that they must duplicate this work multiple times. A better approach would be to permit cable operators to gather the relevant data and make this calculation once and to use the figures derived from such calculation to respond to all requests for some set period of time. ACA Connects proposes three years.⁵

The Commission should also set minimum rates or adjust the leased access rate formula for cable operators so those operators making little to no profits can be fairly compensated for diverting capacity for leased access that is far more valuable for broadband. The Commission’s formula for determining a maximum allowable leased access rate is intended to allow cable operators to receive a “reasonable profit”.⁶ It is

⁴ In a larger company, the process may involve input from multiple business units. In a smaller company, even the president or CEO may be directly involved.

⁵ Another way to lower the administrative burden for smaller cable system operators is for the Commission itself to publish a uniform, non-discriminatory “safe harbor” per channel rate that any cable operator may elect to use in lieu of calculating an individualized rate. To calculate the safe harbor, the Commission could use its own implicit rate formula with data inputs based on national averages (or a reasonable sampling of data from large cable operators). The Commission could then update the safe harbor rate on a periodic basis to account for marketplace changes. In addition to helping cable operators reduce their administrative costs, adopting a safe harbor would benefit potential lessees by making minimum pricing information publicly available prior to their initial contact with a cable operator. The Commission has adopted a similar safe harbor in other contexts in order to minimize the administrative burdens of making complex calculations. *See, e.g., Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 21252, ¶ 6 (1998) (adopting an interim safe harbor percentage that wireless telecommunications providers could use to allocate their revenue between the interstate and intrastate jurisdictions for purposes of calculating universal service contributions); *see also In the Matter of Universal Service Contribution Methodology; Federal-State Joint Board on Universal Service*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518 (2006).

⁶ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation Leased Commercial Access*, Second Report and Order and

designed to compensate cable operators for the value of their channel capacity, and is structured such that systems that are more profitable—those with more subscribers and with higher profits per-subscriber⁷—may charge higher rates.

Yet for some operators, the “value” of channels *for video* is negligible. In such cases, leased access programmers can appropriate channel capacity for next to nothing, or nothing at all. The problem has been getting worse over time, particularly for many small cable system operators, as their profit margins for video services have been steadily decreasing. Indeed, video profit margins have declined so much for smaller system operators that some ACA Connects members have gotten out of the video business entirely, while others are considering doing so.⁸

Second Order on Consideration of the First Report and Order, 12 FCC Rcd 5267, ¶ 19 (1997) (“When the full set-aside capacity is not leased to unaffiliated programmers, the maximum rate would be based on the operator’s reasonable and quantifiable costs (i.e., the costs of operating the cable system plus the additional costs related to leased access), including a reasonable profit.”). Note, however, that the “additional costs related to leased access” do not include the administrative or transaction costs of responding to information requests. In fact, in 1997 the Commission expressly rejected a request by ACA Connects (known at the time as the Small Cable Business Association) that small cable operators be permitted to include in their rates “an additional some of at least \$1,000 as compensation for transaction costs,” reasoning that the recovery that operators may gain from subscriber revenue for leased access programming will sufficiently offset any additional transaction costs.” *Id.* ¶ 158.

⁷ Small cable system operators generally pay higher programming fees than their larger competitors, which lowers their per-subscriber profits.

⁸ See, e.g., Written Statement of Patricia Jo Boyers before the House Energy and Commerce Committee at 7 (June 4, 2019), *available at* https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony_Boyers_0.pdf. (“Indeed, a handful of the smallest video providers have exited the video business entirely and become broadband-only providers. Every small to medium-sized cable system—including mine—has at least considered the possibility.”); Mike Farrell, Montana Provider to Pull Plug on Video, Multichannel News (June 11, 2009) (describing plans by 3 Rivers Communications to stop providing television services on Oct. 31).

In reality, the highest and best use of such capacity for many cable systems is to increase broadband offerings and performance. But the existing formula may result in cable system operators having to make capacity available to leased access programmers for free instead of using the capacity for broadband. This, surely, is unacceptable. To prevent this, the Commission should set a minimum rate that a cable system operator could use to charge leased access programmers or adjust the formula to prevent the maximum rates from becoming so low.⁹

* * *

ACA Connects appreciates the Commission's efforts to reduce the burdens of leased access. We believe it can and should further reduce those burdens and are happy to work with it in doing so.

⁹ The establishment of a safe harbor rate as described in footnote 5 could also address this problem.

Respectfully submitted,

**ACA CONNECTS —
AMERICA'S COMMUNICATIONS
ASSOCIATION**



By: _____

Matthew M. Polka
President and CEO
ACA Connects — America's Communications
Association
875 Greentree Road
Seven Parkway Center, Suite 755
Pittsburgh, PA 15220
(412) 922-8300

Ross J. Lieberman
Senior Vice President of Government Affairs
ACA Connects — America's Communications
Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

July 22, 2019

Michael D. Nilsson
Mark D. Davis
Harris, Wiltshire & Grannis LLP
1919 M Street, NW
The Eighth Floor
Washington, DC 20036
(202) 720-1300

Attorneys for ACA Connects